

CANADA / JUDGMENT

K.R. v. J.R.

2024 BCSC 2185

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2024 BCSC 2185 K.R. v. J.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.R. v. J.R. ,

2024 BCSC 2185

Date: 20241203

Docket: E51523

Registry: New Westminster

Between:

K.R.

Claimant

And

J.R.

Respondent

Before: The Honourable Justice Schultes

Ruling re Application for Special Costs

Counsel for Claimant:

G. Thomas

Counsel for Respondent:

L. MacLean, K.C

F. MacLean,

O. Spinks

Date of Written Submissions:

January 23, February 15, April 5,

November 22, 29,

December 1, 4, and 5, 2023

Place and Date of Judgment:

New Westminster, B.C.

December 3, 2024

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Introduction

- [1] The respondent in this family law matter is applying for special costs against the claimant, based on the allegations that she:

- introduced obviously fraudulent documents at trial, which purported to show ownership by the respondent of a property outside of Canada, without making any attempt to determine whether the documents were genuine;
 - dishonestly minimized her income to support her spousal support claim;
 - gave false testimony throughout the trial; and
 - breached an existing court order by harassing the respondent and his office manager, B., thereby committing contempt of court, and gave false testimony about those actions.
- [2] The respondent also seeks special costs against the claimant's brother J., who was a witness at trial, arising from his involvement in sending a complaint to the respondent's professional regulatory body, and his denial in his testimony of that involvement. The claimant's involvement in this scheme and her denial of it in her testimony form an additional basis for her liability.
- [3] In addition, the claimant's trial counsel are said to have tendered the fraudulent property documents without carrying out the kinds of inquiries about their authenticity that were required in that situation, although if they are found to be liable for special costs on this basis, he submits that the resulting award should still be made against her.
- [4] If he is unsuccessful in obtaining an order for special costs, the respondent submits that at least double costs should be awarded, on the basis that his settlement offer before trial was one that the claimant should reasonably have accepted.

Background

- [5] Because of the parties' prominent roles within their community, it was necessary to omit more identifying details than usual from the reasons for judgement at trial in order to preserve their anonymity. I have followed the same approach in these reasons.
- [6] They are both family physicians. They separated in 2013, after a 25-year marriage. Their separation and its aftermath were tumultuous, and the claimant's behaviour led to orders excluding her from the parties' former joint medical practice and the family home.
- [7] A previous trial, which was held in 2015, dealt with property issues. Due to findings by a master that she had misconducted herself at the pretrial stage, the claimant was only permitted to participate in that trial to a limited degree, and she did not take full advantage of the opportunities to participate that were still available to her. Special costs were awarded against her, due to her lack of cooperation with the litigation process.
- [8] On appeal (2016 BCCA 261), the claimant secured a new trial with respect to the issue of spousal support, on the basis that it had not actually been dealt with at the trial, despite an order of the trial judge purporting to dismiss it.

- [9] In addition to this revived spousal support claim, the other main issue in the second trial was the respondent's claim for contribution from the claimant to the extensive costs of post-secondary education for the parties' three children, who have all obtained undergraduate degrees and gone on to attend medical school. During the first trial he had been content to bear those costs himself, in the interests of concluding the litigation. However, once the claimant was permitted to pursue spousal support, he sought contribution to them from her - I infer at least in part as a means of defending against that claim.
- [10] In my reasons for judgment in the second trial (2022 BCSC 1856) I rejected the spousal support claim, finding that the claimant had not been disadvantaged by her role during the marriage or by its dissolution, and that the disparity in the parties' current income was due to deliberate decisions on her part.
- [11] I also held that the claimant was responsible for 50% of the children's post-secondary expenses, from 2016 to the point at which each one ceased to be a "child of the marriage" for support purposes.
- [12] A further finding of fact that is relevant to the present application is that the claimant was the person responsible for an ongoing campaign of harassment towards the respondent, as well as towards B., the office manager of their clinic, whom she suspected, completely without evidence, of carrying on an intimate relationship with him. The evidence of her behaviour was led by the respondent to undermine her credibility, and for its alleged effect on his ability to pay spousal support.
- [13] As a result, I made a final order extending an interim conduct order against the claimant that had been made part way through the trial, which prevented her from having any contact with B., or attending at B.'s home or workplace.
- [14] I also found that her brother J. was the author of an anonymous complaint about the respondent that was made to the College of Physicians and Surgeons of BC. It concerned the respondent's liability for a bylaw infraction as a result of his co-ownership of a piece of undeveloped properties. I was satisfied that the claimant had directed or encouraged this complaint.
- [15] In the course of reaching these conclusions, I found that the claimant was not a credible witness, and that I could not accept any of her evidence unless there was confirmatory evidence on the point in question.
- [16] The respondent made full submissions in favour of special costs at the conclusion of the trial. The claimant preferred to reserve her submissions until the outcome of the trial was known, which I allowed her to do. In my reasons for judgment I gave the respondent the opportunity to supplement his original submissions. He has now done that, and the claimant has responded.

Special Costs

General principles

- [17] As is well known, special costs are awarded when there has been "reprehensible conduct" in the litigation, which the court seeks to distance itself from by an award that is punitive, rather than compensatory, in nature: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177, at para. 56.
- [18] Reprehensible conduct encompasses scandalous or outrageous conduct, as well as milder forms of misconduct that are nonetheless deserving of reproof or rebuke: *Garcia v. Crestbrook Forest Industries Ltd.*, 9 BCLR (3d) 242, at para. 17; 1994 CanLII 2570 (BC CA) ["Garcia"].
- [19] However, "simply because the legal concept of 'reprehensibility' captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term". The court must exercise restraint in imposing special costs, and the party seeking them must establish exceptional circumstances. Reprehensibility will likely be found "in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant": *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352, at para. 73.
- [20] A combination of factors, no single one of which would necessarily have been sufficient in itself, can support a finding that a party's conduct is reprehensible: *Garcia* at para. 28.
- [21] Special costs are not available to address pre-litigation conduct, or conduct that is the subject of the actual claims in issue: *Smithies* at para. 131-133; *Kyle Estate v. Kyle*, 2017 BCCA 329 at paras. 45, 48 and 49. Special costs are intended to punish a litigant for their conduct "during the litigation itself": *Sull v Pengelly*, 2019 BCSC 1565, at para. 29 ["Sull"].
- [22] Crucially, special costs are not awarded based simply on the rejection of a party's testimony: *Grewal v. Sandhu*, 2012 BCCA 26 at para. 107. Rather, there must have been "false evidence that has been contrived, concocted, or fabricated with an intention to mislead on an issue that is central to a matter before the court": *Behan v. Park*, 2014 BCSC 1982 at para. 49.
- [23] Similarly, material non-disclosure standing alone is likely to justify special costs only if it is "egregious, gives rise to delay, and is 'obstructive' in its purpose and result". If it does not meet this standard, it may still form part of the overall circumstances that justify such an award: *Sull*, at para. 43.
- [24] In contrast, maintaining unfounded allegations of fraud or dishonesty is well-recognized as in itself forming a proper basis for special costs: *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914, at para. 11.

- [25] A court has the ability to order costs against a non-party pursuant to its inherent jurisdiction, but such an order should only be made in special circumstances, which include "fraudulent conduct, abuse of process or gross misconduct in the conduct of litigation": *Anchorage Management Services Ltd. v. 465404 B.C. Inc.*, 1999 BCCA 771, at paras. 21, 27.
- [26] In particular, a party's lawyer may be ordered to pay special costs personally, pursuant to Rule 14-1(33) of the Supreme Court Family Rules when the lawyer has "caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault". The requirement of reprehensible conduct still applies to an order made under this rule, although where only party and party costs are being sought against the lawyer, mere delay and neglect may be sufficient to justify an order: *Nazmdeh v. Ursel*, 2010 BCCA 131 at para. 101. The court in *Namzdeh* emphasized that the power to award special costs against a lawyer "is to be used sparingly and only in rare or exceptional cases": para. 103.
- [27] An order for special costs may also be imposed against a lawyer pursuant to the court's inherent jurisdiction to protect its own processes: *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26 at para.18. Once again however, such a power is to be exercised "with restraint and caution": para. 26.

Use of fraudulent property documents in the trial

The documents

- [28] The claimant has maintained since the first trial that the respondent owns property in their country of origin, or elsewhere, that he has not disclosed in the litigation.
- [29] During their cross-examination of the respondent's brother P. on July 22, 2020, the claimant's counsel advised that they had just received some additional documents, which they then provided to the respondent's counsel and put to P.
- [30] This material, which is purported to have been created in 2014, consisted of:
- powers of attorney in the respondent's and his brother's names, granting the authority to a person in the United Kingdom to enter into an agreement to purchase a property in their country of origin on their behalf;
 - a certified bank draft, apparently bearing the respondent's signature, for "Six Hundred Thousand Pound Sterlings" [sic] drawn on a bank in the U.K. It was payable to a person who had the same middle and surname as the attorney; and
 - a sale deed, a property valuation, and a certificate showing the payment of "stamp duty", which is a requirement of a property purchase in the country where the property was located.
- [31] These documents contained redactions of some additional identifying details.

Communications with the sender

- [32] After the documents had been disclosed, the respondent applied to conduct a forensic examination of the claimant's electronic devices, in an effort to find out where the documents had come from.
- [33] In response to his application, she produced a series of text communications with the person who had allegedly provided them to her. She claimed not to know the identity of the sender. After I granted the respondent's application (2021 BCSC 104), the forensic expert retained by the respondent to examine her devices found additional text messages between her and the sender about the documents.
- [34] In these communications, the sender initially offered to provide the claimant with material relating to investments by the respondent in the British Virgin Islands. The sender then advised her that they had sent "some documents that can help you in a big way" to her email address, and that they also had "clear uncensored copies" of those documents. They invited her to make a "considerable offer" to purchase unredacted versions. They elaborated that "the person working inside is big taking risk for us [to obtain the documents] because they can sue her" and that "[t]he opposing party's lawyer believe that if these documents get to court, then they might suffer a big loss and might have to pay a big amount".
- [35] The claimant said that on July 22, 2020 she received the versions of the documents that were tendered at the trial by email, from a person named K.G. A copy of the email in question formed part of the evidence.
- [36] Earlier that month, on July 7, she had received an email from the same person, enclosing a document showing the ownership details of a different piece of agricultural land in the parties' country of origin, as well as an excerpt from a voters list in that country that contained the names of members of B.'s family. The sender wrote in the email that "I have passports and other legal and illegal documents of this [that is, B.'s] family".
- [37] The claimant explained that she did not provide this earlier email to her counsel because it did not seem to be related to the present trial.
- [38] The claimant had an ongoing dialogue with the sender about the authenticity of these documents. In response to her message that "they are saying the documents are forged", the sender responded, "Yes of course they will say that because they know you cannot verify old [...] documents from [country of origin] easily. They may also get the notary [whose stamps were attached to the powers of attorney] to lie for them because he is their friend. And notary also doesn't keep any record so it's easy for them." The sender claimed that the notary would say he had no records because he is related to B.'s aunt.
- [39] They added that if the claimant could pay a "good amount", "then my brother in [country of origin] can get the old property owner [G.] to give his statement for you through video".

- [40] Further, perhaps in an effort to encourage the claimant to purchase the documents, the sender wrote, "Can you feel stress on their faces now? Because they hid it so well and now it's out in the open". To the same effect, they noted that the respondent's "lawyer is saying that he will prove the papers baseless because the main parts are blacked out. Unless you submit full copies with full details. Just letting you know for your reference". When the claimant asked if the sender could get a "full copy from [country of origin]", the sender replied that they had it in their possession.
- [41] The sender ultimately demanded a payment of \$50,000. On July 23 they provided a location to which the claimant could attend personally to pay the money. On that date, the claimant said that she was having trouble accessing her bank, due to the long lineups that were being caused by the pandemic. The sender responded that she could message them "if bank work out for you".
- [42] She did not ultimately go to the location that had been provided, which appeared to be a business address in downtown Vancouver, to pay for the documents.
- [43] In a later exchange the claimant wrote, "His lawyer said I blacked out the papers and I have the clear papers and I am doing fraud in court and should go to jail". The sender replied, "Sorry you fooled me and refused to pay so I contacted someone from the other side and they going give me even more money not to leak the papers and they are going to make payment morning tomorrow".
- [44] Apparently related to these last comments by the sender, on July 26 text messages were sent to the after-hours line at the respondent's medical clinic. In them, an unknown sender wrote that he had been told to make the "papers" by "a lady named [claimant's first name]" and that they had "raw papers that I can provide for u". The sender invited an offer of payment, but declined a request by B., who had replied on behalf of the respondent, to provide their identity.
- [45] On the same date, a robotic-sounding voice mail message was received on that after-hours line, advising "[the respondent's first and middle name] if you want to know truths about [city in which property located] papers then text me at [number provided].
- [46] The respondent's theory was that the claimant was the person who fabricated the documents, and that she also created a fictitious third party in these text messages to offer the documents to her. As an alternative, he suggested that her brother J. could have played that role.
- [47] A key aspect of this theory is the timing of one of the messages from the sender. Before the afternoon court break on July 22, P. had testified that neither he nor the respondent were in the UK in July 2014, when the draft from Barclay's Bank had been drawn up. At 3:20 pm, after the afternoon break, the sender responded to a series of questions from the claimant with a message that included:

"Barclays has their banker links in Canada through which you can make drafts here, you do not have to go to U.K."

As I described in my reasons:

- [286] [N]o one except the occupants of the courtroom at that time, which consisted of the parties, their counsel, the clerk of the court and me, would have heard P's testimony that the respondent could not have physically obtained the Barclays draft. Despite this, the unknown person immediately provided what could be interpreted as assurance to the claimant that the respondent's physical presence in the U.K. would not have been necessary to obtain it. Adding to its potential weight, there was no earlier message in the disclosed communications from the claimant that had inquired specifically about legitimacy of the draft.
- [48] Another tell-tale sign of her complicity, according to the respondent, was that during her cross-examination she attributed the misspelling of a name in the text conversation to the size of her fingers in relation to the keyboard on her phone, even though that misspelling was in one of the sender's messages. After initially being unable to say whether she or the sender had typed that particular message, she firmly asserted that she had not typed it.

Proof that the documents were not genuine

- [49] The respondent provided evidence of the documents' fraudulent nature in the trial.
- [50] During the hearing of the application for a forensic examination of her electronic devices, which was held in September and October of 2020, the claimant's counsel disavowed any reliance on the documents in support of her case. Despite this concession, the ease with which the respondent says their fraudulent nature could have been detected by the claimant or her counsel is an important aspect of his claim for special costs, so the obviousness of those indications of fraud need to be considered.
- [51] The respondent (who was recalled as a witness on this issue) and his brother denied that they were involved in the property transaction in question. In particular, the respondent denied that he has ever had an account at Barclay's Bank, and demonstrated that his passport contains no stamps indicating that he travelled to the UK in 2014.
- [52] He also obtained evidence from the jurisdiction where such a property would have been located that nothing conforming to its description in the documents was registered in the respondent's and/or P's name during the month in question in 2014.
- [53] Based on his inquiries, the business that purported to have provided the valuation certificate for the property appears not to exist.
- [54] In addition, he called as witnesses the local notary who was alleged to have dealt with the powers of attorney, and the general counsel for the Society of Notaries Public for British Columbia. The notary confirmed that he had not drafted these documents, and pointed out several features of them that would not be found in documents that had been prepared by

him. The general counsel added that the documents lacked features that would have been required in order for them to be approved for onwards transmission to the country where the property was located. Of particular interest, he said that the notarial seals attached to the documents had a line next to them that appeared to be "an artifact of scanning".

- [55] Further factors weighed against the genuineness of these documents. If one does a Google search for powers of attorney to use in the country in question, the form used for these two documents is the first result to appear. And, bizarrely, the description that was provided of the property's dimensions means that it would be shaped like a kite.

The claimant's personal view of the documents

- [56] Despite her counsel's formal position in the litigation that they would not be relied on, in her supplementary testimony with respect to them the claimant was not prepared to concede that the documents were fraudulent. She explained that she does not trust internet searches, and believes that the only means of determining whether the respondent actually owns the property would be to travel to the country where it is located and make direct inquiries. As of the time she testified, she had been prevented from carrying out that travel by the pandemic.
- [57] She agreed that she had not taken any steps to verify the authenticity of the documents, or examined their contents for signs of fabrication, and that she was not persuaded by any of the evidence that the respondent had provided about the deficiencies in them.
- [58] She explained that when she received these redacted versions, she "did not have time to sit and search and say is this real if this is true I was made to suffer so much, properties locked, no money to run the first trial. That just rocked my mind" (emphasis added).
- [59] She agreed that on August 14 she received an email from her brother J., with whom she had been in contact about this property, enclosing two listings that potentially conformed to the information that could be gleaned from the redacted documents. J. told her that one of them, which was the same size as the property referred to in the documents, was more likely to be the one they were searching for.
- [60] In general, she emphasized that she had "every right to find" property belonging to the respondent, and would be expanding her search to the entire city to which these documents relate.

Findings at trial

- [61] Since findings have a direct bearing on the appropriateness of special costs, I will quote them in full:

- [392] I cannot find that it is more likely than not that the claimant was the author of the communications offering the fraudulent property documents, or of the text and voice mail messages to the clinic offering them to the respondent. I am also unable to find that she created the property documents [herself].
- [393] I think it would take a level of subtlety and sophistication far beyond what she has demonstrated in any other aspect of this case to craft such a peculiar and distinctive series of communications, including her own efforts to lay hands on the documents, (the eagerness and obsequiousness of which portray her in an extraordinarily bad light), and the growing frustration of the unknown person with her lack of immediate compliance with their demands.
- [394] It is also not clear how emailing herself documents relating to B.'s family under the same name a few weeks earlier, but then not disclosing them, at the risk of her credibility in the trial, would advance such a plot. It would likewise show a level of inventiveness that she has not been shown to possess to identify herself as the person behind the fabrication of the documents in the text messages to the clinic.
- [395] More fundamentally, one wonders why, if she was the one who created the documents in the first place, why her false persona never pulled the trigger on releasing unredacted versions to her, which she could just as easily have created, leaving her only with the less probative and incriminating versions of them.
- [396] In reaching this conclusion, have kept in mind the perplexing question of how the unknown person came to refer to the ability of a user in Canada to access Barclays Bank, when the need for such information had arisen only minutes before in the presence of a limited number of court attendees. Possible explanations include that the claimant passed the information on to the person in another manner, such as by texting or calling them on a phone that she has not disclosed. Given that the information is imbedded in a reply to the mundane question of which of B.'s aunts the notary who supposedly drafted the documents [was related to], another possibility is that it is a coincidence - merely the expression of a further thought by the unknown person. Regardless of its provenance, that particular message does not undermine my overall conclusion that the claimant could not have created these communications, in all their unusual detail, or the documents.
- [397] Similarly, while it seems bizarre that a third party would inject themselves into a family dispute with a fraud of this nature, that factor in itself does not outweigh the unlikelihood that the claimant could have impersonated such a third party so convincingly.
- [62] I also made the following comments on the potential impact on the request for special costs of that conclusion:
- [446] If it assists, my preliminary view based on these findings is that the claimant's unreasonable insistence on the legitimacy of the fraudulent documents certainly undermined her credibility, but may not amount to reprehensible conduct, in light of her

counsel's ultimate decision not to rely on them. Further, if there was any error in disclosing them and relying on them for initial cross-examination without making inquiries about their legitimacy, that would have been her counsel's error, rather than hers. Of course, I remain open to being persuaded that a different conclusion is appropriate.

The respondent's position

- [63] He points out that it ultimately took eight days of trial to address these documents, which was an additional expense to him over and above the already considerable cost of this protracted trial. While his counsel was able to confirm, by an immediate phone call to the local notary whose stamps were used, that the documents were not genuine, neither the claimant nor her counsel took even that basic step before putting them forward, let alone contacting any of the parties who apparently created them.
- [64] Tendering them amounted to an allegation by the claimant that the respondent had committed "perjury and fraud" in his testimony and his disclosure about the property he owned. This allegation would in itself have threatened his career, and it caused him considerable stress until it was refuted.
- [65] To aggravate matters, the claimant obstinately refused ever to acknowledge that the documents were fraudulent, and maintained this position in the face of her counsel's disavowal. Her responses to cross-examination on this point demonstrated her ongoing fixation on the respondent's supposed secret property ownership, in the complete absence of any credible evidence, which is in itself highly blameworthy.
- [66] The respondent approaches the claimant's lawyers' involvement from the perspective that there is no evidence that she ever instructed them to conduct an analysis of the genuineness of the documents. Viewed in this manner, their failure to do so is an omission for which she should be liable in costs.
- [67] If it was actually her counsel who erred in tendering them without a proper inquiry, as I tentatively suggested in the reasons for judgment, the respondent submits that the award of special costs should still be made against her. This would allow her to be indemnified by her counsel for their error, but would preserve the essential confidentiality between them.

The claimant's position

- [68] She submits that the claim for special costs under this heading has been resolved by my finding that she did not create the fraudulent documents, and by her counsel's express disavowal of any reliance on them.

- [69] As a useful example of the relevance of a disavowal, the court in *Perez v. Vancouver (City)*, 2003 BCSC 579 found that a further factor weighing against a special costs order (in addition to its finding that the documents were not actually forgeries) was the decision of the defendant not to rely on the documents as soon as suspicious circumstances surrounding their creation had emerged.
- [70] The claimant concedes that the respondent had to address the documents on July 22, 2020 - the day on which they were introduced - and on July 24, the next sitting day (on which counsel for the Society of Notaries Public was called). But there was then a break in the trial until the continuation dates in January 2021, and in the meantime her counsel disavowed any reliance on the documents during the respondent's disclosure application. It would not be appropriate, she submits, to visit the costs of the respondent's subsequent unnecessary efforts to disprove the documents, which consumed the balance of the evidence in the trial, on her.
- [71] In that regard, she notes that by the time the documents were introduced, she had already testified and been cross-examined in her own case, so my impressions of her credibility would already have been fully formed. I took her to mean that pursuing the issue of the documents was a gratuitous action on the respondent's part, in light of what actually remained in issue in the trial by then. And, as she noted in her trial submissions, these documents had no relevance to spousal support in any event.
- [72] The claimant also takes issue with the proposition that she was under a duty to authenticate the documents before making any further use of them. Her position is instead that once she received them, her obligation under the Rules was to disclose them. Rule 9-1(6) of the SCFRs requires a party to "promptly" amend their list of documents and serve the amended list on the other side whenever a document that could be used to prove or disprove a material fact, or that they intend to rely on at trial, comes in their possession or control.
- [73] As to the liability of her lawyers, she submits that even if it could be said that they disclosed the documents too quickly after she provided them, that error certainly does not fall within the category of reprehensible conduct.

Discussion

- [74] Despite my inability to find that she had created them, there is still no question that the circumstances under which the claimant received these documents were bizarre, and should clearly have raised her suspicions about the motives of the person who provided them. I am also satisfied that her deep hostility towards the respondent, and her fixed belief that he owned undisclosed property inclined her to seek to make immediate use of them in the litigation, without conducting the inquiries that the respondent's counsel subsequently made.

- [75] But when considering her liability for special costs in relation to the documents, it is important to keep in mind that the actions that it actually rests on consisted of (1) passing the documents on to her counsel and (2) maintaining under subsequent cross-examination, despite her counsel's decision not to rely on them, that it remained an open question whether they were genuine.
- [76] I cannot really fault the former action, since her counsel would have been in the best position to determine their relevance in the litigation and to conduct any follow-up inquiries with respect to them. She is a relatively sophisticated litigant in terms of her education and professional status, but those are still exercises of judgment that should be carried out by counsel. Most importantly for the issue of special costs, it was the tendering of the documents at trial that implied that the respondent had not been honest about his property holdings, not her act of providing them to her counsel.
- [77] As to the latter action, while it does her no credit that she remained so coy on the issue after evidence showing fairly conclusively that the documents were not genuine had been provided, that position in itself contributed nothing to the risk that they would be relied on, and simply undermined her suspect credibility in the trial even further.
- [78] I also think that once the documents had been disavowed by her counsel during the disclosure hearing, they were eliminated as a factor that could affect the outcome of the trial, or the respondent's reputation.
- [79] From that point, offering further proof of their fraudulent nature and seeking to cross-examine her with respect to them must have been a strategic effort on his counsel's part to provide additional proof of her reckless conduct and vindictiveness where the respondent is concerned, thus undermining her credibility to an even greater extent than her initial cross-examination. As a litigation strategy that was fair enough, but the additional costs of weaponizing the documents to advance the respondent's interests, after they had ceased to pose any risk to his position, do not lie at the claimant's feet.
- [80] It is also important to point out that while non-disclosure is a serious matter in family litigation, the implicit assertion of the documents - that the respondent had not fully disclosed his property holdings in the litigation - falls short of the kinds of explicit and unfounded assertions of actual fraud that are seen in the special costs decisions. I cannot find that it was career-threatening for the respondent in any sense, as has been suggested.
- [81] Thus, I am unable to find that the claimant's conduct in relation to the document was reprehensible, so as to justify special costs.

- [82] Turning to counsel's potential liability, I agree with the submission that it was their duty to list and disclose the documents promptly, since those documents had at least an arguable ability to prove the spousal support claim, by showing that the respondent's overall means (and therefore his ability to pay support) were greater than he claimed. Even without that degree of relevance, they were documents that the claimant might have wished to rely on in the trial, since they potentially undermined his credibility.
- [83] However, that duty of promptness carried with it no additional duty to immediately put the documents to the opposing party, or to a witness testifying on their behalf. Counsel cannot be completely credulous about cross-examining on whatever additional documents their client happens to hand to them as the trial progresses. With the benefit of hindsight, it would have been wiser for them to have applied at least some basic scrutiny to the documents (the redactions in themselves should have raised suspicions) or, better yet, to have held off on introducing the documents until the respondent's counsel had had an opportunity to review them as well. This approach might have avoided the documents even being mentioned in the trial.
- [84] While that was an error of judgment on counsel's part, it consisted of conflating their duty of disclosure with their substantive use of the documents in cross-examination, and of excessive haste in making such use when the nature of the documents called for greater deliberation. It did not involve malice, reckless indifference to whether harm was caused, or dishonesty, and it cannot fairly be described as reprehensible conduct. At worst it was poorly thought out but, as least as far as the speed of disclosure was concerned, it was well-intentioned.
- [85] This is therefore not one of the rare and exceptional cases in which special costs should be awarded against counsel personally.

Minimizing income for spousal support

The respondent's position

[86] The submission for special costs under this heading rests on the findings at trial that:

- The claimant was "intentionally severely underemployed", so that income needed to be imputed to her for the spousal support analysis. Specifically, I found that "the decline in her billings over the years was due to a combination of her resentment at being excluded from the clinic she shared with the respondent, an obstinate refusal to adapt herself to the changing conditions of her employment, and a lack of urgency supported by the income from her real estate sales." This intentional underemployment is said to have been part of a plan to punish the respondent by making him pay spousal support;
- She claimed to have been forced out of the medical clinic by the respondent, but I concluded that it was her own "outrageous behaviour" that caused it. The respondent characterizes her testimony on this point as dishonest;

- In the financial statement of her numbered company for 2017, the capital gain on the sale of her property in Vancouver was under-reported by 50%, resulting in a significant reduction to that company's pre-tax income for support purposes that year. This was also characterized by the respondent as an intentional act of dishonesty on her part;
- She did not submit any of her billings for 2020 to the Medical Services Plan for payment, citing the failure of a secretary at the clinic where she was working to carry out that task on her behalf. This omission required her to make a special application to MSP for reimbursement, which was still outstanding at the time of trial, and from which she expected to receive payments in the range of \$70,000 - \$100,000. The respondent characterizes this as another deliberate attempt to suppress her income to gain an advantage on the issue of support;
- She deliberately minimized the role that her mother and other caregivers played in caring for the children during their pre-school and elementary school years, and exaggerated the extent to which they still required her attention during their senior high school years, when they had acquired a significant degree of independence. Once again, this is submitted to have been deliberately dishonest.

The claimant's position

- [87] She submits that none of these actions are "conduct in the litigation", which is what special costs are intended to address.
- [88] In addition to that shortcoming, the evidence dealing with her underreported capital gain falls short of justifying special costs because it did not arise from any testimony or representation on her behalf, but instead was identified during the testimony of the respondent's accountant. The underreporting in question occurred before the current litigation, so it is precluded from being considered for that reason as well.

Discussion

- [89] I think that the claimant is largely correct on this issue.
- [90] The respondent relies on evidence of behaviour that resulted in findings against her in the trial, both with respect to her entitlement to spousal support and her credibility generally, but that behaviour did not relate in any way to the manner in which the litigation was carried out by her.
- [91] The reasons for her underemployment and her exclusion from the clinic, the actual extent of her domestic contributions, her underreporting of a capital gain, and her failure to bill MSP in 2020 were all relevant to her claim for spousal support in the action and/or her credibility, and my rejection of her evidence with respect to them certainly contributed to her failure to prove that claim. But neither that conduct nor my rejection of her version of events with respect to it provide a basis for special costs. According to the authorities I have referred to, there needs to be at least some connection between the conduct complained of and the litigation process - as is found, for example, in deliberately false testimony or

egregious non-disclosure. Evidence at large in the trial does not provide a basis for special costs merely because it shows a party behaving badly in relation to the opposing party.

[92] I also did not characterize the testimony by the claimant on some of these issues as having been fabricated with the specific attempt to mislead. I simply disbelieved it.

[93] As a result, this category of conduct does not support an award of special costs either.

Ongoing false testimony (including actions by the claimant's brother)

The respondent's position

[94] This submission, which is based on my adverse findings about the claimant's credibility during cross-examination, is that her "intransigence and dissembling", in combination with her reliance on fraudulent documents, increased the length of the trial and the expense to the respondent.

The claimant's position

[95] As she has for other bases of liability, she points out the distinction between the findings of credibility that led to my rejection of her testimony, and a finding that her testimony was deliberately dishonest or misleading. The latter of course is the essential element of reprehensible conduct in the testimonial context.

Discussion

[96] In what may be a familiar refrain in these reasons, I did not find that the claimant's poor performance in cross-examination reflected the sort of deliberate dishonesty that is essential to a finding that special costs are appropriate. Once again, the extensive shortcomings in her manner of responding to questions simply caused me to disbelieve her.

Breach of court order and false testimony about those actions

The respondent's position

[97] There are two aspects to the claimant's potential liability here.

[98] The first is her alleged dishonesty in denying during cross-examination that she was the person had engaged in a campaign of harassment against the respondent and B., including denying that she continued to watch and beset B.'s home between the first block of trial dates in 2020 and the continuation in January 2021.

[99] The second aspect is that this contact with B. was a breach of my interim order, which is said to be sufficiently blameworthy in itself to justify special costs.

The claimant's position

- [100] As in the case of previous similar allegations, she points out that I did not make a finding that her denial of the harassment involved deliberate dishonesty on her part, despite my rejection of it and my finding that she was the person responsible.
- [101] She also notes that I did not make any express finding that she had thereby breached the interim conduct order, and no application was brought to have her found in breach of it.

Discussion

- [102] In my opinion, the claimant correctly draws the same distinction between evidence that is disbelieved and evidence that is found to have been deliberately dishonest that prevailed under previous headings.
- [103] The actual breach of the interim order by her subsequent lurking around B.'s house was capable of resulting in sanctions under the Family Law Act, which were not sought.
- [104] But even assuming these actions were aspects of her conduct in the litigation, which is not clear to me, costs are a poor fit in this kind of situation, when the FLA has a complete regime for enforcement. Therefore, I would not award special costs based on that conduct. (I should say however, that nothing turns on the lack of a formal conclusion in the reasons that she had committed such a breach, since it was implicit in my factual finding that she returned to B.'s house after the interim order was imposed.)

Complaint to the College of Physicians and Surgeons (including J.'s liability)

The respondent's position

- [105] This submission is based on the denials by her and her brother J. that they were involved in sending the anonymous complaint to the College of Physicians and Surgeons of BC about the respondent. As I have said, I found that J. was its author, based on the similarity of his known handwriting samples to the writing in the complaint.
- [106] The respondent maintains that J.'s conduct falls within two of the established categories of conduct that justify special costs against a third party: fraudulent conduct (writing the anonymous complaint, which was false) and perjury (denying having written it).
- [107] More broadly, the alleged liability of both the claimant and J. is grounded in the principle, which I referred to in my summary of the applicable principles, that serious allegations of fraud and other misconduct that are made without cause will lead to an order of special costs. This encompasses not only the complaint to the College, but the reliance on the fraudulent property ownership documents.

[108] The respondent says that his counsel sought an address for the brother, who is a physician in Ontario, so that he could be notified of a claim for special costs against him for one day of the trial. However, the claimant's counsel did not respond with any contact information.

The claimant's position

[109] With respect to J., she noted that her counsel do not act for him and that she was unaware whether he had received any notice of the claim of special costs against him. As a result, her submissions do not address his potential liability.

[110] Her submissions also do not address her complicity in the complaint to the College that J. wrote.

Discussion

[111] I am doubtful that the claimant directing or encouraging J. to make an anonymous complaint about the respondent to his regulatory body is an aspect of her conduct in the litigation itself, as opposed to being yet another manifestation of her enduring hostility to the respondent, which offered yet another basis to reject her testimony. It is also worth noting that while the intent of making it may well have been to cause difficulties for the respondent, it had a factual basis in his joint responsibility for a bylaw infraction, as opposed to having been wholly invented.

[112] As to J.'s liability, it is obviously fundamental to any attempt to obtain special costs from a third party that the third party have notice of the application. Despite this, the respondent has not made any efforts to provide such notice, beyond requesting J.'s address from the claimant's counsel. This is obviously insufficient, and the lack of notice in itself precludes any further consideration of a special costs award against him.

[113] Had notice been provided however, I would have had the same doubts about whether the report was conduct in the litigation itself, as opposed to simply being a malicious act that was carried out while the litigation was in progress.

Post-judgment complaint

Background

[114] In November 2023, while this costs application was under reserve, the respondent submitted a decision of the College, which was communicated to the claimant in July of that year, dismissing a complaint made by her against him as being vexatious. She had alleged that the respondent had committed a "boundary violation" with B. The timing of the complaint, her history of conflict with the respondent and B., and the nature of her own relationship with B. led the College to conclude that the intention of the complaint was to "annoy, harass, or embarrass [the respondent and/or B.] or to abuse the College's complaints process".

Respondent's position

[115] He argues that this is yet another attempt by the claimant to carry out her "scorched earth policy" with respect to his reputation, and that it needs to be rebuked in the same way as the similar efforts that preceded it.

Claimant's position

[116] She points out that this complaint does not fall within the range of conduct in relation to which I permitted submissions. It cannot be seen as forming part of the family law case for which special costs are being considered, much less the conduct of litigation for that case, and it is also temporally detached from the relevant time period.

Discussion

[117] I am prepared to accept that conduct by a party that relates to the litigation itself and that occurred while a decision on costs was under reserve could be relevant to the question of special costs - for example, obstructing the implementation of the trial judgment, or deliberately falsifying documents that are required to be produced under it. I am also satisfied that the scope of the submissions that I invited on costs was broad enough to include relevant post-judgment conduct.

[118] The problem with relying on this complaint is the same one that undermined the respondent's reliance on the previous discreditable conduct by the claimant to support special costs - it incorrectly assumes that abominable behaviour by her that is contemporaneous with the litigation is for that reason alone related to the conduct of it. As I have attempted to explain, special costs are not a freestanding remedy for everything that is objectionable about a party's conduct while the case is ongoing.

Cumulative effect of behaviour

[119] In this case the cumulative effect of these actions weighs no more heavily in favour of a special costs order than any individual one did, so viewing them in that manner does not alter my conclusions.

Double Costs

Background

[120] In March 2019 the respondent sent the claimant a formal offer to settle the litigation. The proposal was put forward "as an alternative to further acrimonious and costly litigation". The respondent offered to assume 75% of the responsibly for the children's education expenses, both retrospectively and prospectively, for as long as each child remained a "child of the marriage". In return the claimant would have to assume 25% of those costs and withdraw her claim for spousal support.

[121] The letter containing the offer contained the following explanation for the respondent's position:

It is our position that your client is not entitled to spousal support given her substantial asset base as well as her ability to earn an income equal to our client's. Your client is obligated to pay child support and her portion of section 7 expenses. Your client has made a claim for child support and stated at the JCC that she would contribute towards the children's section 3 basic guideline and section 7 expenses which would include their living expenses, tuition, books and the like. We suggest section 3(a) or 3(b) would apply depending on whether the children live at home or abroad. We are informed that your client has not made any substantial contributions towards the children's basic section 3 or section 7 expenses since the JCC. To date, our client has paid approximately \$1,405,516.28 towards the children's educational and living expenses and your client is responsible for a portion of these. We attached spreadsheets including a summary of all expenses as well as details of those per child. We further note that the children's living arrangements have changed being that while not in school, they reside with our client.

[Emphasis added]

Principles

[122] Rule 11-1(5)(b) of the SCFRs permits a court to award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle. Pursuant to Rule 11-1(6), the factors to be considered in making such an award are:

- a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
- b) the relationship between the terms of settlement offered and the final judgment of the court;
- c) the relative financial circumstances of the parties; and
- d) any other factor the court considers appropriate.

[123] The purpose of the rule governing double costs was described in *Hartshorne v. Hartshorne*, 2011 BCCA 29:

[25] An award of double costs is a punitive measure against a litigant for that party's failure, in all of the circumstances, to have accepted an offer to settle that should have been accepted. Litigants are to be reminded that costs rules are in place "to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer."

[124] The Court also provided guidance in applying the "ought reasonably to have been accepted" test:

[27] The first factor is not determined by reference to the award that was ultimately made. Rather, in considering that factor, the court must determine whether, at the time that the offer was open for acceptance, it would have been reasonable for it to have been accepted... As was said in *A.E. v. D.W.J.*, [2009] B.C.J. No. 748 "The reasonableness of the plaintiff's decision not to accept the offer to settle must be assessed without reference to the court's decision" . . . Instead, the reasonableness is to be assessed by considering such factors as the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether it could be easily evaluated, and whether some rationale for the offer was provided. We do not intend this to be a comprehensive list, nor do we suggest that each of these factors will necessarily be relevant in a given case.

The respondent's position

[125] He submits that this situation is comparable to the one in *Kraft v. Kraft*, 2018 BCSC 1184, aff'd 2019 BCCA 204, in which an offer to settle a family case was found to be one that ought to have been accepted, on the basis that it was:

34 made well before trial was comprehensive in nature, and would have resolved all of the issues in dispute between the parties, thus avoiding the need for a trial. It was sufficiently detailed and clear so as to be easily evaluated

[126] The offer was also found to have been reasonable in the sense that "[t]he spousal support claim would have been abandoned in exchange for reasonable reapportionment of assets between the parties" (para. 35).

[127] The respondent adds that there is no danger of upsetting the financial balance between the parties by an award of double costs, since the claimant holds a multi-million dollar property portfolio.

The claimant's position

[128] While she concedes that the aspect of the offer dealing with the apportionment of the children's expenses was reasonable, on its face, there was no means then available for her to evaluate the financial implications to her of assuming 25% responsibility for them.

[129] More importantly the offer would have required her to abandon the compensatory spousal support claim on which she had obtained a new trial, and which at that point she was entitled to regard as valid.

Discussion

[130] I am unable to conclude that this offer was one that ought reasonably to have been accepted by the claimant.

- [131] Accepting it would have involved her abandoning her own claim completely. The rationale for doing so was based on the parties' current financial situation and earning capacity, which would have precluded a non-compensatory claim, but was not necessarily dispositive of the compensatory one that she actually pursued in this trial. This would have been an almost complete capitulation without any reason being given to doubt the basis of her claim, with the only benefit being a reduction in her support obligations.
- [132] Further, while her 25% contribution to the amount that had been spent to that point could have been readily calculated, the duration and amount of her ongoing costs was unknown, and in light of the children's living arrangements and dependence on the respondent to provide them with funds, would have been completely determined by him.
- [133] As to the other relevant considerations, the respondent obviously obtained a greater degree of success at trial than he had offered to settle for, and the parties are both financially very well-off, so their respective positions are not decisive.
- [134] Balancing these factors, I conclude that it would not be appropriate to order double costs.

Conclusion

- [135] As I have explained, the respondent's submissions for special costs were based either on behaviour that was not related to her conduct of the litigation, or on findings with respect to the intention underlying her testimony that I did not make.
- [136] With respect to double costs, the offer in question was not one that she should reasonably have accepted, and none of the other relevant considerations weigh in favour of such an order.
- [137] Accordingly, the respondent will receive his costs of the action at the ordinary scale of difficulty except for the costs of this application, which will be to the claimant, again at the ordinary scale of difficulty. Any disputes about the calculation of these costs can be referred to the registrar, who will certify the results.

"Schultes J."

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